O F M I C H I G A N

C O U R T O F A P P E A L S

KEVIN AGEE, Plaintiff-Appellee,	UNPUBLISHED November 10, 2011
v	No. 300094 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	LC No. 10-000035-MD

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the trial court denying its motion for summary disposition on the grounds that plaintiff's claims are barred by governmental immunity. MCR 2.116(C)(7). We reverse and remand for entry of an order granting defendant's motion for summary disposition.

I. MATERIAL FACTS AND PROCEEDINGS

Plaintiff was involved in a single-vehicle motorcycle accident while travelling southbound on Southfield Road, somewhere within approximately one quarter-mile of Ford Road. Within 15 days of the accident, plaintiff's counsel sent a letter to defendant that described the location of his accident as "at on [sic] the Service Drive for Southbound Southfield Freeway at Ford Road in the City of Dearborn, MI[,]" and described the nature of the defect that caused his accident as "defective roadway" and "defective pavement." The complete language contained in the notice submitted to defendant was:

> Please be advised that our office has been retained by Kevin Agee, to represent him with regard to injuries sustained on 10/13/2009 as a result of a defective roadway at on [sic] the Service Drive for Southbound Southfield Freeway at Ford Road in the City of Dearborn, MI.
>
> As a result of the defective pavement, Plaintiff's motorcycle went airborne, causing him to sustain serious injuries including, but not limited to: right leg and ankle, requiring surgery[.] If you need any additional information, please feel free to contact our office.

Seven months after the accident, plaintiff filed this lawsuit in the Court of Claims, alleging that defendant's negligence caused his injuries. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claims were barred by governmental immunity, specifically arguing that plaintiff did not provide defendant with the statutorily required notice contained within MCL 691.1404(1). The trial court disagreed, ruling that it did not find "any non-compliance with the statute or any substantial non-compliance." In addition, the court stated:

> But I think in my view this is sufficient. First, the letter speaks for itself. There's a date. There's a reasonably precise location. I mean do we have to say that this was located 47 feet from the, you know, the quarter section marker, you know? Nobody is suggesting that. I mean the notice has to be reasonable, and as Mr. Gray has indicated, allow the State to defend that case and to repair the problem.

The court also added that defendant could minimally be charged with "constructive notice" of the police report made regarding the accident, even though the report was not submitted by plaintiff with his notice. Defendant has appealed as of right the trial court's denial of its motion for summary disposition premised upon statutory governmental immunity. MCR 7.203(A)(1); MCR 7.202(6)(v).

II. ANALYSIS

Governmental agencies are granted immunity from tort liability when they are engaged in a governmental function, MCL 691.1407(1), and no exception to that immunity applies. The Legislature has set forth six exceptions to governmental tort immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). At issue in the instant case is the "highway exception," which provides that a governmental agency can be liable for damages caused by a defective highway. MCL 691.1402(1).

The Legislature has been very specific about what preconditions must be met in order to bring a claim for an injury occurring from a defective highway. In particular, Michigan statutory law provides that an injured person must timely notify the governmental agency having jurisdiction[1] over the roadway of the occurrence of the injury, the injury sustained, the "exact location and nature" of the defect, and the names of known witnesses. MCL 691.1404(1) provides in full that:

> *As a condition to any recovery for injuries sustained by reason of any defective highway*, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the *exact location and nature of the defect*, the injury sustained and

[1] Only the governmental agency with jurisdiction over the highway at the time of the plaintiff's injury is liable. *Moser v Detroit*, 284 Mich App 536, 539; 772 NW2d 823 (2009). Defendant does not dispute that it has jurisdiction over the highway in question.

> the names of the witnesses known at the time by the claimant. [(Emphasis supplied.)]

The purpose of requiring notice is to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Plunkett v Dep't of Transp*, 286 Mich App 168, 176-177; 779 NW2d 263 (2009).

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), the Court held that MCL 691.1404 was "straightforward, clear, unambiguous," and "conclude[d] that it must be enforced as written."[2] A plaintiff's notice to a governmental agency is not deficient if it substantially complies with the statute's requirements. *Plunkett*, 286 Mich App at 176-177. Notice given to the governmental agency, while it must comply with MCL 691.1404(1), "need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Id.* at 176. A notice should not be found defective when it is in substantial compliance with the statute. *Id.* "[A] liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect." *Id.* However, a plaintiff must at least "adequately" describe the location and nature of the defect, so as to reasonably appraise the governmental entity of the plaintiff's claims. *Id.* at 178.

Plaintiff argues that his description of the location of the roadside defect was adequate, because he described the road he was on, the direction he was heading, and the closest cross street. Plaintiff additionally argues that he provided the best possible notice under the circumstances, because he was seriously injured in the accident and taken away by ambulance. Plaintiff similarly argues that his description of the nature of the defect as "defective pavement" was sufficient, because it indicates that the pavement itself caused the injury rather than a foreign object, and because it was the best description plaintiff could make under the circumstances.

We conclude that both plaintiff's description of the location of the defect and his description of the nature of the defect are vague and imprecise. The area in question is a stretch of highway approximately one quarter-mile long, yet plaintiff did not provide reference to any landmarks that might have assisted defendant in narrowing down the area, nor did plaintiff attach the accident report, photographs or other descriptive material that would have provided a more exact location. *Plunkett*, 286 Mich App at 179; see also *Rule v Bay City*, 12 Mich App 503, 508; 163 NW2d 254 (1968) aff'd 387 Mich 281; 195 NW2d 849 (1972). Indeed, in several of our earlier decisions applying MCL 691.1404(1) or it's similar predecessor, our Court held that a facially deficient description of the location or nature of injury could be satisfied by looking to other evidence submitted with the notice, or if the description of the nature of the defect was so specific that it aided in determining the location, which was otherwise not sufficiently clear. *Rule*, 12 Mich App at 508; *Smith v Warren*, 11 Mich App 449, 453-454; 161 NW2d 412 (1968);

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[2] As we will discuss later, *Rowland* also expressly overruled both *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976) and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), holding that "the engrafting of the prejudice requirement onto the statute was entirely indefensible" in light of several rational bases for enacting the notice provision that rendered it constitutional. *Rowland*, 477 Mich at 211-212.

Jones v Ypsilanti, 26 Mich App 574, 584; 182 NW2d 795 (1970).

Here, neither plaintiff's description of the defect as both "defective pavement" and "defective roadway", nor the vague description of the location as the service drive near a particular road-an area of roadway that is approximately ¼ mile long-provided the notice required by the statute. Though our Court and the Supreme Court have upheld the use of the phrase "defective sidewalk" as sufficiently descriptive of the nature of the defect, that was only when "[c]oupled with the specific description of the location, time and nature of injuries" that allowed the notice to comply with the statute. *Jones*, 26 Mich App at 584. Nothing in the notice provided by plaintiff allows the two descriptions to be read together in a manner to narrow the location of the incident. As we said some 43 years ago, "[s]ome degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects, but to approve the notice given here would be to nullify the statute." *Smith*, 11 Mich App 455.

Finally, we briefly address plaintiff's argument, which we assume is presented to us for purposes of a later appeal, that we should disregard *Rowland* and instead apply the prejudice requirements of *Hobbs* and *Brown*. For two reasons we reject plaintiff's argument. First, we are not empowered to disregard binding precedent from our Supreme Court. *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 353-354; 785 NW2d 45 (2010). Second, even if we were, we would not do so since *Rowland* correctly observed that the statute simply has no "prejudice" requirement, and none needs to be judicially added in order to construe it as constitutional. *Smith*, 11 Mich App at 454 (noting justifications for the notice requirement).

Accordingly, we reverse the denial of defendant's motion and remand to the trial court for entry of an order granting summary disposition to defendant pursuant to MCR 2.116(C)(7). We do not retain jurisdiction.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio